

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST:)	
FOR REVIEW BY:)	CHARGE NO.: 2008CF2962
)	EEOC NO.: 21BA81793
TRACY M. BLICHARZ,)	ALS NO.: 09-0296
)	
Complainant.)	

ORDER

This matter coming before the Commission by a panel of two, Commissioners Sakhawat Hussain and Rozanne Ronen, presiding, upon the Complainant's Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Department") of Charge No. 2008CF2962, Tracy M. Blicharz, Complainant, and the Chicago Transit Authority, Respondent; and the Commission having reviewed *de novo* the Department's investigation file, including the Investigation Report and the Complainant's Request and supporting materials, and the Department's response to the Complainant's Request; and the Commission being fully advised upon the premises;

NOW, THEREFORE, it is hereby **ORDERED** that the Department's dismissal of the Complainant's charge is **SUSTAINED** on the following ground:

LACK OF SUBSTANTIAL EVIDENCE

In support of which determination the Commission states the following findings of fact and reasons:

1. The Complainant initially filed an unperfected six-count charge of Discrimination (Counts A – F) with the Department on April 16, 2008, perfected on April 21, 2008. In Counts B, D, and F of her charge, the Complainant alleged that the Respondent had retaliated against her for having complained about sex discrimination, in violation of Section 6-101(A) of the Illinois Human Rights Act (the "Act"). On June 26, 2008, at the Complainant's request, the Department administratively closed Counts B, D and F.
2. The Department thereafter investigated the remaining Counts, which alleged the following violations of Section 2-102(A) of the Act: Count A, wherein the

Complainant alleged that she was issued a Final Written Reprimand on March 12, 2008 because of her sex; Count C, wherein the Complainant alleged that she was issued a one-day suspension on March 12, 2008 because of her sex, and Count E, wherein the Complainant alleged that she was discharged from her employment on April 2, 2008 because of her sex. After an investigation, the Department dismissed Counts A, C and E of the Complainant's charge for lack of substantial evidence. The Complainant filed a timely Request on June 8, 2009.

3. The undisputed evidence in the file shows that the Complainant was hired by the Respondent on June 26, 1998. At the times relevant to her charge, the Complainant worked for the Respondent as an Inventory Control Coordinator. The Complainant's supervisor was male.
4. The Respondent had in place an Excessive Absenteeism Policy ("the Policy"). The Policy stated that excessive absenteeism included unapproved and unexcused absences.
5. The Policy also provided four steps to follow in corrective action for excessive absenteeism: **(1)** Two instances warranted a written warning; **(2)** Four instances warranted a final written warning and a one day suspension; **(3)** Six instances warranted a three suspension/probation, and **(4)** Seven instances warranted a recommendation for discharge. The Policy also permitted the Respondent to discipline employees for an unauthorized absence, even if there was good cause for the unauthorized absence.
6. On July 20, 2007, the Complainant had received a written warning for excessive absenteeism because she had accumulated five unauthorized absences in a 12-month period. Also, on July 20, 2007, the Complainant had received a final written warning and a one-day suspension for gross misconduct.
7. On September 18, 2007, the Respondent issued the Complainant a three-day suspension and a twelve-month disciplinary probation for insubordination. The disciplinary notice indicated that future incidents of discipline within the next year would result in a recommendation of discharge.
8. On March 12, 2008, as alleged in Counts A and C of the charge, the Respondent issued the Complainant a written warning and a one-day suspension. The file contains a document called a "Record of Interview," dated March 12, 2008, which indicates that the Complainant was given a Final Written Warning and a one-day suspension for excessive absenteeism accumulated since July 20, 2007, and lists the following instances: **(1)** November 2, 2007, failed to report for duty; **(2)** February 6, 2008, called off sick; **(3)** February 9, 2008, tardy 22 minutes; **(4)** February 23, 2008, failed to report for duty, called off sick, and **(5)** February 28, 2008, called off sick.

9. In her Request, the Complainant argues that she submitted doctor's notes for the February 6, 2008 and the February 28, 2008 absences, and that she was absent those days because she was experiencing complications with her pregnancy. Regarding the February 23, 2008 date, the Complainant indicates that she worked on March 1, 2008 in lieu of working February 23, 2008. However, the Complainant does not assert nor provide evidence that any of the absences that were cited in the March 12, 2008 "Record of Interview" were authorized.
10. On March 22, 2008, the Complainant was scheduled to begin work at 6:00 a.m. Over one hour after her scheduled start time, the Complainant reported to her manager that her car was not working. The Complainant did not come into work on March 22, 2008. There is no evidence in the file that the Complainant's absence on that date was authorized.
11. A second "Record of Interview," dated March 24, 2008, indicated that the Complainant was interviewed regarding the March 22, 2008 incident. The document also indicated that the Complainant had violated her disciplinary probation of September 18, 2007, by failing to report to work in a timely manner. The document further listed various rules violated by the Complainant as a result of this incident. The document indicated that the Complainant was suspended without pay pending a meeting with the Respondent's General Manager of Warehouse Operations on March 31, 2008. The March 24, 2008 "Record of Interview" also notified her that the recommended action was to discharge her from employment.
12. Thereafter, as alleged in Count E of the charge, the Respondent discharged the Complainant on April 2, 2008 for violating her probation and for violating the rules listed on the March 24, 2008 "Record of Interview."
13. In Counts A, C, and E of the charge, the Complainant alleges that she was absent for legitimate reasons, and that she presented the Respondent with documentation to justify her absences. The Complainant alleges that similarly situated male employees who were cited for excessive absenteeism were not suspended. The Complainant also alleges that although the Respondent fired her for poor work performance, her work was as good as, or better than, a similarly situated male co-worker, whom she identified in her charge.
14. Furthermore, in her Request, the Complainant states that, she was "charged" by the Respondent for absences even when she had a doctor's note for the absences, which contradicts her manager's assertion that she was not "charged" for these absences. The Complainant also contends that after the March 12, 2008 suspension and Final Written Warning, the next appropriate disciplinary step should have been a corrective case interview and a three-day suspension, rather than termination. Finally, for the first time in her Request, the Complainant also suggests that it was discrimination based on pregnancy in that she argues that male employees would not have been absent due to pregnancy.

complications. She states that two male managers made derogatory statements regarding her pregnancy complications to another female inventory control coordinator.

15. In its Response, the Department recommends that the Commission sustain its dismissal based on lack of substantial because the Complainant failed to establish a *prima facie* case of discrimination. The Department argues that there was no evidence either presented by the Complainant, or discovered by the Department, of a similarly situated male comparative with an attendance and disciplinary history comparable to the Complainant's, who was not issued a written warning and suspension, or who was not discharged under similar circumstances. The Department further found no evidence of pretext.
16. The Commission's review of the Department's investigation file leads it to conclude that the Department properly dismissed the Complainants' charge for lack of substantial evidence for the reasons stated by the Department.
17. As correctly stated by the Department, a *prima facie* case of sex discrimination is established by some evidence that the Complainant falls within a protected class, that she was performing her job satisfactorily, that she was subjected to an adverse action, and that the Respondent treated a similarly situated employee outside of the protected class more favorably under similar circumstances. See Marinelli v. Human Rights Commission, 262 Ill.App.3d 247, 634 N.E.2d 463 (2nd Dist. 1994). Furthermore, a person is similarly situated when he is...“directly comparable to [the Complainant] in material respects.” See Patterson v. Avery Dennison Corporation, 281 F.3d 676, 680 (7th Cir. 2002)(*Internal citations omitted*). Factors to be considered include whether or not the Complainant and the alleged comparable had the same supervisor or manager, engaged in similar conduct and had similar background—such as attendance or disciplinary history. See Id.
18. As to Counts A and C of the charge, there is no evidence in the record that similarly situated male employee who had a record of excessive absenteeism was not given a Final Written Warning and one-day suspension. In fact, the undisputed evidence in the file showed that a male employee was issued the same discipline for the same reason as the Complainant.
19. Even assuming that the Complainant could establish a *prima facie* case of sex discrimination as to Counts A and C, the Respondent offered a legitimate non-discriminatory reason for its actions, and the Complainant did not present any evidence, nor did the file reveal any evidence, that the proffered reason was a pretext for discrimination. The reason stated in the March 12, 2008 “Record of Interview” indicated that the Final Written Warning and one-day suspension followed a history of absences and late arrivals by the Complainant. Given the Complainant's history of continuing problems with her attendance and performance, the Complainant has not met her burden to provide some evidence

that the reason given by the Respondent for suspending her and issuing her the Final Written Warning was a pretext for discrimination.

20. Further, the Complainant's contention that she had a good reason for some of her absences does not prove a violation of the Act because the Policy provided that employees could be disciplined for *all* unauthorized absences, even those for which there may have been good cause. Assuming that the Complainant had good cause for some of the identified absences, there is still no evidence in the file that any of the absences which led to her one-day suspension and the Final Written Warning had been authorized by the Respondent.
21. As to Count E of the charge, which alleges discharge based on sex, there is no evidence that a similarly situated male employee was treated more favorably under similar circumstances. The Complainant alleged that the male comparable also did not come to work when he had car trouble. However, the alleged comparable identified by the Complainant in her charge was not similarly situated to the Complainant because he did not have a record of disciplinary and performance issues that was comparable to the Complainant's at the time he could not come to work due to car trouble. Further, unlike the Complainant, the alleged comparable was not on probation for prior disciplinary issues.
22. Even assuming the Complainant could establish a *prima facie* case as to Count E, the Complainant offered no evidence that the Respondent's proffered legitimate non-discriminatory reason for discharging her was a pretext for discrimination. It is undisputed that at the time of the March 22, 2008 incident, the Complainant had already been previously suspended for three-days and placed on a 12-month probation for similar attendance issues. She had also been warned that further violations within that 12-month period could result in her termination. The March 22, 2008 incident occurred within that twelve month period. The undisputed evidence shows that the Complainant had received opportunities in accordance with the Respondent's Policy to correct her performance and attendance issues, and when she failed to do so, pursuant to the Policy, she was discharged.
23. Finally, regarding the Complainant's new contentions in her Request that the Respondent took adverse actions against her because of her pregnancy, or that she was treated differently because of her pregnancy, the Commission does not have the statutory authority to review new allegations or charges of discrimination that are raised for the first time in a request for review. See 775 ILCS 5/8-103 (West 2009).
24. Accordingly, it is the Commission's decision that the Complainant has not presented any evidence to show that the Department's dismissal of her charge was not in accordance with the Act. The Complainant's Request is not persuasive.

THEREFORE, IT IS HEREBY ORDERED THAT:

The dismissal of Complainant's charge is hereby **SUSTAINED**.

This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and the Respondent, the Chicago Transit Authority, as appellees, with the Clerk of the Appellate Court within 35 days after the date of service of this order.

STATE OF ILLINOIS)
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HUMAN RIGHTS COMMISSION)

Entered this 16th day of September 2009.

Commissioner Sakhawat Hussain

Commissioner Rozanne Ronen